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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 60.

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 247-258) is reported at 221 F. 2d 590.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 22, 1955 (R. 259-260). The petition for a writ of certiorari was filed on May 2, 1955, and was granted on

December 5, 1955, limited to question (2) presented by the petition (R. 262). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Whether the trial court should have instructed the jury that petitioner, who had been indicted for the felony of attempted evasion of income taxes (according to the statute endorsed on the indictment), could be convicted of the misdemeanor of filing a fraudulent return with intent to defeat the assessment.

STATUTES AND RULE INVOLVED.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

26 U. S. C., former Section 145, provides:

(b) **Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U. S. C., former Section 3616 (a), provides:

Whenever any person—

False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000.00, or be imprisoned not exceeding one year, or both, at the discretion of the Court, with costs of prosecution.

STATEMENT.

Petitioner was convicted on all counts of a three-count indictment charging an attempt to evade certain income taxes for the years 1951, 1952 and 1953 by filing fraudulent returns. The statute alleged to have been violated on the face of the indictment was Title 26, U. S. C. A., Section 145 (b) (R. 5-7, 221-222). The amounts of income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1951)	$5,177.22	$566.54	$8,669.88	$1,324.42
Count II (1952)	5,514.50	691.42	7,464.50	1,149.86
Count III	5,293.34	775.52	6,193.34	984.76

Petitioner was sentenced to four years imprisonment on each of the three counts, the sentences on all counts to run concurrently (R. 235).

Petitioner during the years 1951, 1952 and 1953 was the business manager of the St. Louis Labor Health Institute, a non-profit organization furnishing free medical care to members of Teamsters' Local 688, A. F. of L., and their families (R. 51-54). The Labor Health Institute is operated on funds collected from employers who maintain collective

bargaining agreements with Local 688 (R. 51). As business manager of the Labor Health Institute, petitioner controlled the organization's bank account (R. 120); he personally approved payment of all bills incurred by the Labor Health Institute and drew and signed the checks therefor (R. 55, 120, 128, 153). The checks were counter-signed by another employee (R. 55, 120, 128). In 1949 the Labor Health Institute contracted with J. Shulman and Sons Contracting Company for extensive alteration work on its premises in St. Louis (R. 133). The general contractor subcontracted the painting work to one John Schmidt (R. 67, 79). In 1950, after the original painting contract was completed, Schmidt was called back by the Labor Health Institute for further work (R. 67). Schmidt testified that petitioner then approached him with a plan whereby he, Schmidt, would submit padded bills to the Labor Health Institute by overstating his amount of labor performed; petitioner, knowing of Schmidt's overstatements, would approve the bills, sign and draw checks in his capacity as business manager on the organization's bank account to Schmidt, issue payment to Schmidt, and then Schmidt would return the amount of the overpayment to petitioner (R. 67). It was Schmidt's testimony, and some of his checks were introduced in substantiation, that petitioner had received some $5,000.00 under this arrangement during the years 1951, 1952 and 1953 (R. 71, 72). During these same three years Schmidt testified that he did approximately $2,500.00 to $3,000.00 worth of painting at petitioner's home which, with petitioner's knowledge and connivance, he charged in his billing to the Labor Health Institute and received payment in the same way; that is, petitioner approved his bill, knowing it was overstated, drew and signed the organization's check, and issued payment to Schmidt (R. 72, 73). The evidence also showed that in 1951 petitioner had the J. Shulman and Sons Contracting Company subcontract for certain con-

crete work at his home and build a knotty pine rathskellar in his basement (R. 57, 59-62, 136). The cost of this work (some $1,500.00) was recovered by the J. Shulman and Sons Contracting Company by billing it to the Labor Health Institute, securing petitioner's approval of the bills, and petitioner's issuing checks in payment, signed by him in his capacity as business manager and drawn on his employer's checking account (R. 135). These amounts constituted the alleged unreported income received by petitioner during the three years in question.

Petitioner requested that the jury be instructed that it might find him guilty of a lesser crime than the one endorsed on the indictment (R. 216, 217). Specifically, this instruction would have told the jury to find him guilty of a violation of Section 3616 (a) of the Internal Revenue Code of 1939 if it believed he had delivered a false income tax return to the Collector with intent to defeat or evade the assessment of the tax (R. 216, 217). The trial court refused petitioner's request (R. 214). The Court of Appeals affirmed the conviction (R. 258) and ruled adversely to petitioner on this issue, relying on its earlier case of **Dillon v. United States**, 8 Cir., 218 F. 2d 97. The rationale of the **Dillon** case is that no lesser instruction was required because Section 3616 (a) is inapplicable to income tax violations.

SUMMARY OF ARGUMENT.

Section 3616 (a) of the Internal Revenue Code of 1939 applies to income tax derelictions. The Government so conceded in its brief opposing certiorari, **Dillon v. United States**, No. 37, this Term. It has frequently been utilized in the prosecution of income tax cases. The language "with intent to defeat or evade" clearly indicates the necessity for proof of wilfulness. The enactment of the predecessor of Section 3616 (a) as part of a Revenue Act which included income tax, its collocation in the Internal Revenue Code of 1939, and its incorporation in Section 7207 of the Internal Revenue Code of 1954, all indicate its applicability to fraudulent income tax returns. The Government also conceded that Section 3616 (a) prohibits a wilful attempt to evade income taxes by filing fraudulent returns. This view is supported by the plain language of Section 3616 (a) in proscribing against the filing of "fraudulent" returns "with intent to defeat or evade . . . the assessment." Section 145 (b) also forbids a wilful attempt to evade income tax by filing fraudulent returns.

Under an indictment, citing Section 145 (b) of the Internal Revenue Code of 1939, a felony, and charging an attempt to evade income taxes by filing a false and fraudulent return, the trial court should have instructed the jury, as requested, that defendant could be convicted of the misdemeanor under Section 3616 (a) which section, as conceded by the Government, specifically prohibits the filing of a false and fraudulent return for the purpose of evading taxes. A violation of the lesser offense was charged in the indictment. It was "necessarily included" in the allegations of the indictment under Rule 31 (c) of the Federal Rules of Criminal Procedure which authorizes a conviction for an offense "necessarily included in the offense charged" by being included in the acts alleged

in the indictment and was thus sufficiently charged. A defendant is informed of the "essential facts constituting the offense" by the allegations of the indictment and not by the statute cited or by the statutory definition of the greater offense. The prosecution is not limited to the statutory citation but may have every offense sufficiently charged submitted. The accused should have the same right. Moreover, the prosecution ought not to fail when it fails to prove an allegation charged, if it proves sufficient facts constituting a crime of which defendant has had notice. There are state court decisions interpreting statutory counterparts of Rule 31 (c) which support this interpretation and a contrary rule has not been established by the Courts of Appeal.

Moreover, the Government has conceded that the indictment in the **Dillon** case which is substantially the same as the instant indictment charged a violation of Section 3616 (a) by saying that Sections 3616 (a) and 145 (b) are "two statutes, each of which punishes exactly the same act." The Government's position fails to recognize that the Section 145 (b) felony under the instant indictment is the more aggravated offense encompassing the misdemeanor under Section 3616 (a). In essence, its position is that the United States Attorney may choose under which section to prosecute and punish "exactly the same act" and, once having so elected, this choice is unalterably binding on a defendant. No ascertainable standards are present under the Government's view to guide the United States Attorney in his decision except, that Section 3616 (a) is to be reserved for what is vaguely referred to as "minor" offenders. Whether the standard "minor" as contrasted with "major" is to guide in terms of wilfulness or the size of the taxpayer's deficiency, we are not told. On the other hand, petitioner suggests that the difference between the two statutes lies in the degree of wilfulness exerted with a tax evasion motive and this is properly a

jury question under Rule 31 (c). Permitting the jury to resolve whether a defendant is guilty of a felony or a misdemeanor under Rule 31 (c) (where the pertinent statutes, the indictment, and the evidence will support both) would avoid any constitutional questions raised permitting persons guilty of "exactly the same act" to be unreasonably discriminated against by being made subject to disparate punishments and by permitting the United States Attorney's discretion in such regard to be exercised without any ascertainable standard.

Even if a "necessarily included" offense must be embraced within the statutory definition of the greater offense, the misdemeanor under Section 3616 (a) is embraced within the greater offense of Section 145 (b). Although Sections 3616 (a) and 145 (b) are couched in different language, they cover the same type of derelictions.

ARGUMENT.

Section 3616 (a) of the Internal Revenue Code of 1939, a Misdemeanor Which Forbids the Filing of a Fraudulent Return With Intent to Defeat the Assessment Is "Necessarily Included in the Offense Charged" Under the Instant Indictment Charging an Attempt to Evade Income Taxes by Filing a Fraudulent Return, a Felony Under Section 145 (b) of the Internal Revenue Code of 1939 (the Statute Endorsed on the Indictment), and the Trial Court Should Have Instructed the Jury, as Requested, That Petitioner Could Be Convicted of the Lesser Offense.

The trial court refused a requested instruction which would have permitted the jury to convict petitioner of a misdemeanor under Section 3616 (a) of the Internal Revenue Code of 1939 (R. 214-217). The court below affirmed the conviction on the basis of its prior ruling in **Dillon v. United States**, 8 Cir., 218 F. 2d 97, holding that petitioner was not entitled to a lesser offense instruction because Section 3616 (a) was inapplicable to income tax violations (R. 258). The court in the **Dillon** case concluded "both from the language of Section 3616 and the statutory context where it was formally placed, that it was never intended to apply to income tax violations," 218 F. 2d, l. c. 103. The court, in reaching this result, found that Section 7207 of the 1954 Internal Revenue Code which replaced Section 3616 was broad enough to apply to income tax derelictions and that the "element of willfulness, absent in Section 3616 but previously consistently present in offenses relating to income tax violations, was inserted," 218 F. 2d, l. c. 103.

But the Government has conceded in its brief in opposition to the petition for certiorari filed in **Dillon v. United States**, No. 37, this Term, that Section 3616 (a) does apply

to income tax returns and that the court below was wrong in this premise, Brief for the United States in Opposition, **Dillon v. United States**, pp. 7-8. The language "with intent to defeat or evade" clearly indicates the necessity for proof of wilfulness. Moreover, the mere omission of the word "wilful" in a criminal statute would not eliminate intent as an element of the offense. **Morissette v. United States**, 342 U. S. 246. The predecessor of Section 3616 was enacted in 1864 as part of a Revenue Act which imposed an income tax and provided for income tax returns.[1] Section 3616 is collocated in the Internal Revenue Code of 1939 next to Sections 3614 and 3615 which authorize the issuance of summons for the inspection of records for the determination of tax liability, including income tax liability. These all point to its applicability to fraudulent income tax returns. Section 3616 is incorporated into Section 7207 of the Revenue Act of 1954 which the court below found applied to income tax derelictions. It overlooked the fact, however, that both the Senate and House Committee Reports relative to Section 7207 state that it did not change existing law.[2]

The applicability of Section 3616 to fraudulent income tax returns has been tacitly assumed in a number of cases. **Ex parte Cohen**, 9 Cir., 191 F. 2d 300, certiorari denied, 342 U. S. 947; **Taylor v. United States**, 9 Cir., 179 F. 2d 640, 643-644; **Kirsch v. United States**, 8 Cir., 174 F. 2d 595, 597-598; **Slick v. United States**, 7 Cir., 1 F. 2d 897; **Ex parte Berkoff**, D. Minn., 65 F. Supp. 976, 979-981; **United States v. Koppelman**, M. D. Pa., 61 F. Supp. 1007, 1008-1009.

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[1] Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285. § 3616 was more immediately derived from R. S. § 3179.

[2] The Senate Report states: "This section, which is identical with the House Bill, contains no material change in existing law." S. Rep. No. 1622, 83rd Cong., 2nd Sess. (1954) 603, 1954 U. S. Code Congressional Service 3251. The House Report is identical. H. R. Rep. No. 1337, 83rd Cong., 2nd Sess. (1954) A. 425, 1954 U. S. Code Congressional Service 1111.

In regard to Section 3616 (a) the Government has also conceded that this statute specifically punishes a wilful attempt to defeat income taxes by filing fraudulent returns. The Government said in regard to both Section 3616 (a) and Section 145 (b) that they are "two statutes, each of which punishes exactly the same act. Each prohibits a wilful attempt to evade and defeat income taxes . . . whenever a taxpayer does file a false return with intent to defeat the tax, the evidence will justify a conviction under either statute." Brief for the United States in Opposition, **Dillon v. United States**, p. 10. Section 3616 (a) makes it an offense to deliver or disclose to the collector "any false or fraudulent . . . return . . . with intent to defeat or evade the valuation, enumeration or assessment . . ." A "false" return by itself might be a return which is merely incorrect due to negligence or some other cause lacking intent and would not necessarily involve an attempt to evade taxes if it were delivered to the taxing authorities. But a "fraudulent" return would include an intent to deceive and an intent to deprive the government of taxes. A "false or fraudulent" return could by a strained construction refer to a false return only. However, anyone who delivers or discloses a false or fraudulent return "with intent to defeat or evade the . . . assessment" is attempting to defeat and evade his taxes. There can be no real difference between this language employed in these sections. Consequently Section 145 (b) and Section 3616 (a) both prohibit a wilful attempt to evade and defeat income taxes and both offenses were charged under the instant indictment in view of the categorical holding in **United States v. Beacon Brass Co.**, 344 U. S. 43, 46, that the felony includes evasion by means of the filing of a fraudulent return.

Under Rule 31 (c) a lesser offense must be "necessarily included in the offense charged."[3] The Government has

[3] Under a charge of murder, defendant may be convicted of manslaughter. *Stevenson v. United States*, 162 U. S. 313, 315; *Wallace*

sought to confine the application of this Rule to the single instance where the lesser offense must be included in the statutory definition of the greater offense, relying on the definition quoted with approval by the Ninth Circuit in **Giles v. United States**, 144 F. 2d 860, 861: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." The Government has taken the position that Section 3616 (a) is not so included in Section 145 (b) because the felony may be committed without perpetrating the misdemeanor and that "one cannot commit the misdemeanor of delivery of a false income tax return with intent to evade the assessment without at the same time committing the felony of attempted tax evasion." Brief for the United States in Opposition, **Dillon v. United States**, pp. 10-11. Presumably, the Government relies on one's ability to commit the felony without filing any return at all, see **United States v. Smith**, 3 Cir., 214 F. 2d 887 and **United States v. Kafes**, 3 Cir., 206 F. 2d 905, while the Government contends that the misdemeanor in Section 3616 (a) is impossible to commit without some affirmative act of delivery or disclosure of the fraudulent return or other false information. Petitioner submits that, while the precise issue is one of first impression in this Court, reason and authority support the interpretation that the language employed in Rule 31 (c) comprehends that a lesser offense is "necessarily included" if it is fairly charged by the indictment. A lesser offense is fairly charged if it is included in the acts alleged in the indictment as constituting the greater offense whether or not the greater may be committed without perpetrating the

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v. United States, 162 U. S. 466, 472. Under an indictment charging robbery, defendant may be convicted of larceny. *Lamore v. United States*, D. C. Cir., 136 F. 2d 766. A suggestion as to its application under the Gambler's Occupational Tax Act, 26 U. S. C. A., former §§ 3294 (c), 2707 (b), is found in *United States v. Kahringer*, 3 Cir., 210 F. 2d 565, 571-572.

lesser.[4] Petitioner has no quarrel with the Government's statement (as far as it goes) of the theory of the necessarily included offense as postulating "a gradation in which the greater offense contains some aggravating incident not found in the lesser", Brief in Opposition, **Dillon v. United States**, p. 9, but merely calls to the Court's attention the accepted corollary of the theory that "where an indictment charges not only the major offense, but also in terms charges a lesser offense, accused may be convicted of the lesser offense, even though not forming a constituent part of the major offense charged", 42 C. J. S., § 271, p. 1295; 22 Cyc. 468.

It is elementary that an accused must be given fair warning of the charges facing him. The nature of his accusation is learned from the allegations of the indictment and not from any particular statute.[5] "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment if the charges made are embraced by some statute." **Williams v. United States**, 168 U. S. 382, 389.[6] Indeed, the accused must be prepared

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[4] Rule 31 (c) was a restatement of existing law, 18 U. S. C. A., former § 565, which provided:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is *necessarily included in that with which he is charged* in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense."

The emphasized portion contains no suggestion of the limitation urged by the Government.

[5] Rule 7 (c), Federal Rules of Criminal Procedure, states in part:

> "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

[6] It is interesting that the word "feloniously" is nowhere employed in the instant indictment so that only the endorsement thereon of Section 145 (b) indicates an intent to prosecute petitioner for a felony. The word "feloniously," even where present in the indictment, probably does not add to the allegations since its omission does not affect the accusation. *United States v. Staats*, 8 How. 41, 49 U. S. 41; *United States v. Amorosa*, 3 Cir., 107 F. 2d 596, 598.

to defend in one count of an indictment against allegations which may constitute violations of several statutes. In **United States v. Tommasello**, 2 Cir., 160 F. 2d 348, 351, one count of the indictment was drawn under a particular statute, but stated facts sufficient to plead an offense under two other statutes as well. The court held that a conviction might be had under any of the three statutes.

Since the prosecution is not limited to the statutory citation in the indictment when the language is sufficient to charge still another or other offenses, the defendant is entitled to have each such other offense submitted to the jury, especially where it is lesser in nature. Failure to charge as to each such offense supported by the evidence might well result in a verdict of guilty on a major offense because the jury believes the defendant guilty of only certain elements of wrongdoing, but when left with the alternative of either entirely acquitting him or convicting him, they will find guilt on the only offense submitted.

The construction urged aids the prosecution as well as the accused. There are occasions where a defendant is shown to be guilty of wrongdoing, but his derelictions are not such as to support every allegation in the indictment. The proof may fail as far as one of the elements charged is concerned. Under such circumstances the defendant should not be acquitted and then tried anew for the lesser violation. The prosecution should request a lesser offense instruction; there is no injustice to require him to face the remainder of the allegations in the indictment. There is more reason for this view than one requiring him to defend against the statutory definition of the major crime charged. "It is the statutory as well as a common law rule that a prosecution ought not to fail for lack of proof if the crime charged is shown to have been committed in a lesser degree than charged in the indictment." **People ex rel. Poulous v. McDonnell**, 302 N. Y. 89, 91, 96 N. E. 2d 614, 615.

Petitioner does not believe any contrary rule has been established by the various circuits. The Ninth Circuit in **Giles v. United States**, 144 F. 2d 860, 861, quoted with approval the following definition of necessarily included offense as used in **House v. State**, 186 Ind. 593, 117 N. E. 647: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." It should be noted that in **Giles** there was no evidence to support the lesser offense and no such instruction was requested.

However, in **Barbeau v. United States**, 193 F. 2d 945, 946-948, the Ninth Circuit held that negligent homicide was included under a first-degree murder charge, which alleged purposeful killing, with deliberation and premeditation. It is not impossible to commit first-degree murder without first having committed a negligent homicide. And the killing of a person by negligence is not necessarily included in the statutory definition of murder in the first degree, which is a killing done purposely with deliberation and premeditation. The most that can be said is that the lesser offense was fairly charged in the indictment.

In **Gaunt v. United States**, 1 Cir., 184 F. 2d 284, 289-290, one count of the indictment charged an attempt to evade income taxes by filing a fraudulent return. Another count charged the making of fraudulent statements within the jurisdiction of a department of the United States by filing a fraudulent income tax return in violation of 18 U. S. C. A., former § 80 (now 18 U. S. C. A., § 1001). The court held that the latter charged a crime within the crime charged in the former. If this offense is embraced within Section 145 (b), a fortiori, Section 3616 (a) is so embraced.

Furthermore, there are decisions by the appellate courts of the various states which support the construction of

Rule 31 (c) here urged, namely, that such an instruction shall be given where a lesser offense is necessarily included in the averments set forth in the indictment and the record discloses proof of such lesser offense. These cases either interpret statutory counterparts of Rule 31 (c) or purport to be bottomed on sound common law principles; one case, **People v. Miller**, 143 App. Div. 215, 128 N. Y. S. 549, aff'd, 202 N. Y. 618, 96 N. E. 1125, is rested on both bases. In **People v. Miller**, supra, affirmed per curiam by the New York Court of Appeals, the court sought to construe Section 445 of the Code of Criminal Procedure reading: "In all other cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment." The defendant had been convicted of a lesser offense which conviction he contended was unlawful since it was not embraced within the statutory definition of the crime for which he had been indicted. He argued, as does the Government in its Brief in Opposition, **Dillon v. United States**, pp. 9-11, that this was exclusive and a necessary condition precedent before such an instruction could be given or lesser conviction returned. After considering the problem and deciding that the statute should be so construed that it is sufficient to sustain a conviction for the lesser offense if the acts constituting it are necessarily included in the acts charged in the indictment as constituting the graver offense, the New York court concluded with its understanding that such was the rule at common law of which the Code section was merely declaratory. To the same effect is **State v. Hanks**, 58 Ariz. 77, 118 P. 2d 71, where the Supreme Court of Arizona interpreted Section 44-1923, Arizona Code 1939, providing that "Upon an indictment or information for any offense, the jurors may convict the defendant of * * * any offense which is necessarily included in the offense charged." The court recognized the theory of gradation postulated by the Government and went on to hold that

the statute without exception has been so construed as to permit the conviction also of a defendant of any lesser offense included in the greater by virtue of the fact that the circumstances constituting the lesser are properly alleged in the indictment charging the greater.

Typical cases which do not appear interpretative of particular statutory counterparts of Rule 31 (c), but which reach the same conclusion, are **Stapleton v. Commonwealth**, 140 Va. 475, 124 S. E. 237; **Brown v. Hollowell**, 197 Iowa 1352, 199 N. W. 257; **Watson v. State**, 116 Ga. 607, 43 S. W. 32; **Moore v. State**, 151 Ga. 648, 662, 663, 108 S. E. 47, 54; **Barton v. State**, 58 Ga. App. 554, 199 S. E. 257. In **Stapleton v. Commonwealth**, 140 Va. 475, 124 S. E. 237, an indictment charged both burglary and larceny and the defendant was convicted of larceny alone. The court found that although larceny was not a constituent part of burglary, a conviction for the lesser crime of larceny was proper. The court there said (124 S. E. at 240-241):

> "The case does not fall within the control or influence of such cases as the Hardy and Curry Case, 17 Grat. (58 Va.) 592, strongly relied on for the accused in which the indictment in terms charges only one major offense, which is held to also embrace the charge of all lesser offenses which are incident to and constitute elements of the major offense. In such cases, only such lesser offenses as are in their nature constituent parts of the major offense can be considered as charged in the indictment, and conviction of such character of lesser offense only can be had and enforced under such an indictment. But such an indictment as that in the instant case is not one which in terms charges only one major offense. It in terms charges both the major and the lesser offense in question, and the conviction of the lesser offense charged may be had and enforced under such an indictment,

because, as aforesaid, the indictment contains a competent specific charge of the lesser offense at common law, and not because the lesser offense is of such character that it is an element of the major offense charged."

Therefore, in the instant case consistent with the Government's position that Sections 3616 (a) and 145 (b) each prohibits a wilful attempt to defeat and evade taxes is the conclusion that the allegations of the indictment charged both the greater and lesser offenses. The lesser was therefore "necessarily included" because it was fairly charged by being included in the averments of the indictment.

While petitioner is willing to accept the Government's thesis that, whenever a taxpayer files a false return with intent to defeat the tax, the evidence will justify a conviction under either statute (as in the instant case), petitioner is unable and unwilling to accept the Government's conclusion that by its original endorsement of a statute number on the indictment it has therefore finally and completely ordained that a defendant is to be charged, tried and convicted under the statute carrying the more serious penalty—and no other. Brief of the United States in Opposition, **Dillon v. United States**, p. 11. Petitioner complains that any indictment—by virtue of anything included in or omitted from its face by the United States Attorney drawing the indictment—should preclude him from Rule 31 (c) when the pertinent statutes and the evidence are to the contrary. When the crimes committed by different individuals are the same, they must be punished in the same manner, by the same range of punishment. Punishment for the same offense may be more severe only if there is a rational basis for difference in punishment such as a prior conviction. E. g., **Moore v. Missouri**, 159 U. S. 673, 678; **Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe**, 302 U. S. 51, 54. An unreasonable discrimination in

punishment among defendants would violate the due process clause of the Fifth Amendment to the United States Constitution. In **State v. Cory**, 282 P. 2d 1054 (Or. 1954), a portion of a habitual criminal act giving the district attorney unlimited discretion to determine whether he will or will not proceed against a person who had previously been convicted of a felony was held to deny equal protection of the law because there was no classification to determine under what circumstances the information should be filed. And in **State v. Pirkey**, 281 P. 2d 698 (Or. 1954), a statute which delegated to a grand jury or a magistrate power to determine in advance whether to charge a defendant with a felony or a misdemeanor for the same offense without fixing a standard for the exercise of that discretion was held to violate the equal protection clause of the state and federal constitution and an indictment drawn pursuant to such statute was dismissed.

Such constitutional problems as are raised by the Government's positron disappear when it is seen that proper instructions to the jury, leaving to its wisdom the gravity of the offense (whether felony or misdemeanor), can readily be given under Rule 31 (c). Whether or not the tax evasion motive played a part (and, if so, how much) in such an aggravated attempt as keeping a double set of books, or making false entries and alterations, or such other affirmative attempts as are illustrated in **Spies v. United States**, 317 U. S., l. c. 499, so as to justify a conviction for a felony is for the jury to determine; whether or not the tax-evasion motive, although present, was subsidiary to some other reason for conduct intended to mislead and conceal—and thus less aggravated from the tax standpoint—so as to justify the lesser misdemeanor conviction is equally for the jury to determine. Thus far, the Government has recognized that there exists some line of gradation between the two offenses and has assumed unto itself the knowledge of the formula for the quantum of

gravity required to proceed under either of the two statutes; in its Brief in Opposition, **Dillon v. United States**, fn. 3, p. 9, the Government advises us of its policy of proceeding against "minor" offenders under Section 3616 (a), leaving the inference that Section 145 (b) has been reserved for "major" offenders. Whether an offender is "major" or "minor" is a proper jury question, it seems, better judged in terms of wilfulness than in dollars and cents and the size of the taxpayer's deficiency.

Even under the Government's theory that no lesser offense instruction can be given unless the lesser offense is necessarily included in the statutory definition of the crime for which defendant is indicted, petitioner was still entitled to such an instruction. The phrase "in any manner", as used in Section 145 (b), is not employed in a vacuum but has to be considered in relationship to the entire tax structure and the possible methods of tax evasion. It is not without limitation.[7] In a tax-collecting system which, despite use of the withholding device, continues to rely "largely upon the taxpayer's own disclosures" (**Spies v. United States**, supra, at 495; see also **United States v. Murdock**, 290 U. S. 389, 395-396), the most obvious "manner" in which evasion or defeat is likely to be attempted is a false statement to the Treasury of the facts upon which the tax is based. This plain fact is highlighted in this Court's **Spies** opinion by the examples given (317 U. S., at 499):

> "Congress did not define or limit the method by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in

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[7] In *United States v. Norvick*, 273 U. S. 202, it was held not to be so comprehensive as to impliedly repeal, as to false returns, the general perjury statute.

any manner'. By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind and **any conduct, the likely effect of which would be to mislead or to conceal.** If the tax evasion motive plays any part in such conduct the offense may be made out.'' (Emphasis supplied.)

Spies illustrates the variety of conduct from which a violation of Section 145 (b) might be inferred. Ultimately, in each of these illustrations, the essence of the wrongful attempt lies in misrepresentations of fact to the taxing officials. Thus, ''keeping a double set of books, making false entries or alterations, or false invoices or documents'' would not fall under Section 145 (b) were their purpose anything other than "to mislead or to conceal" the tax-collecting authorities.

Section 3616 (a)[8] forbids not only the delivery of ''any false or fraudulent lists, return, account or statement,'' but also proscribes against the disclosure of such items. Since every reported tax evasion case either contains a false statement or false disclosure to a Government representative, the language of Section 3616 is as broad in fact as Section 145 (b).

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[8] Under Section 38 Eighth of the Corporation Excise Tax Act of 1909 (36 Stat. 11, 117) and Section 11 F of the Income Tax Act of 1913 (38 Stat. 114, 171), it was an offense to make "any false or fraudulent return, or statement, with intent to defeat or evade the assessment * * *." Similar provisions appeared in Section 18 of the Revenue Act of 1916 (39 Stat. 756, 775) and Section 1209 of the Revenue Act of 1917 (40 Stat. 300, 336). Section 253 of the Revenue Act of 1918 (40 Stat. 1057, 1085), introducing the language now found in Section 145 (b), declared that anyone "who

The fact that convictions were sustained in **United States v. Smith**, 3 Cir., 214 F. 2d 887, and **United States v. Kafes**, 3 Cir., 206 F. 2d 905, where the taxpayer did not file any return, does not make Section 145 (b) broader in scope than Section 3616 (a). In the **Spies** case this Court held that the willful attempt to evade Section 145 (b) could not be established by mere proof of failure to file a return or pay a tax, but that some willful commission was necessary. This willful commission is either a false return or a false statement or disclosure with intent to deceive. Such is the essence of this offense and such acts of commission were present in both **Smith** and **Kafes**. The defendant in the **Kafes** case did not keep proper books of account and therefore one can infer that he disclosed a false account to a Government representative in violation of Section 3616 (a). And in the **Smith** case defendant made false representations to revenue agents and altered his records which undoubtedly led to a false disclosure. These two cases mean that a taxpayer who fails to file a return is not immune from a tax evasion prosecution if he makes false disclosures to agents with intent to defeat taxes. Furthermore, it seems clear that "no return" cases are equally violative of Section 145 (b) and Section 3616 (a) and that Section 145 (b) is not broader on this ground. One may fail to file a return and disclose false information in explanation thereof which would put him in violation of Section 3616 (a) so that a narrower interpretation of Section 3616 (a) on this ground appears unfounded.

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willfully attempts in any manner to defeat or evade the (income) tax imposed by this title, shall be guilty of a misdemeanor * * *." See also Section 1308 (b) of the same Act, 40 Stat. 1143. This provision was re-enacted in the Revenue Act of 1921, Section 253 (42 Stat. 227, 268). In 1924, the provision was enacted as Section 1017 (b) of the Revenue Act of 1924 (43 Stat. 253, 344) as a felony in the language now found in Section 145 (b) of the Code, and was carried forward in subsequent Acts and into the Code. 44 Stat. 9, 116; 45 Stat. 791, 835; 47 Stat. 169, 217; 48 Stat. 680, 725; 49 Stat. 1648, 1703; 52 Stat. 447, 513; 53 Stat. 1, 63.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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